

October 19, 2007

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Citizen Action New Mexico

Date of Filing: September 11, 2007

Case Number: TFA-0224

On September 11, 2007, Citizen Action New Mexico (CANM) filed an Appeal from a determination issued to it on June 5, 2007, by the National Nuclear Security Administration (NNSA) Service Center of the Department of Energy in Albuquerque, New Mexico (NNSA/SC) in response to a request for documents that CANM submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that NNSA/SC release additional information to CANM and perform an additional search for documents responsive to its request.

I. Background

On May 3, 2007, CANM filed a FOIA request with NNSA/SC for, among other things, “all documents, electronic or written, that furnish information as to the inspections, reviews, visits performed by the New Mexico Environment Department, the Department of Energy and/or Sandia National Laboratories during the period of construction activities at the Mixed Waste Landfill (MWL) from July 2006 to the present,” and “all documents, electronic or written, generated by any Quality Control Engineer for the MWL.” Appeal at 1; Letter from NNSA/SC to CANM, August 16, 2007 (Determination). NNSA/SC responded by releasing documents responsive to CANM’s request, but withheld portions of the documents pursuant to 5 U.S.C. § 552(b)(6) (Exemption 6). In its Appeal, CANM challenges NNSA/SC’s withholdings as well as the adequacy of its search for responsive documents. Appeal at 1 -4.

II. Analysis

A. Withholding under FOIA Exemption 6

NNSA/SC withheld names, titles, and initials of contractor employees from the documents it released to CANM. Exemption 6 shields from disclosure “[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to “protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.” *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest

would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the information would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Dep't of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See Frank E. Isbill*, 27 DOE ¶ 80,215 (July 7, 1999) (Case No. VFA-0499); *Sowell, Todd, Lafitte and Watson LLC*, 27 DOE ¶ 80,226 (August 31, 1999) (Case No. VFA-0510).¹

1. The Privacy Interest

NNSA/SC determined that there was a privacy interest in the identity of contractor employees whose names, titles, and initials it withheld, stating that its release “will cause inevitable harassment and unwarranted solicitation.” Determination at 3. CANM argues in its Appeal that the information withheld does “not reveal personal information or records about the individuals” and “there is no evidence that the redacted initials and signatures would not be those of federal SNL [Sandia National Laboratories] employees, not private contractors.”

First, SNL is a government-owned/contractor operated (GOCO) facility. Sandia Corporation, a Lockheed Martin company, manages Sandia for the NNSA. Thus, employees of SNL are contractor employees, not federal employees; the latter have no expectation of privacy concerning their names, titles and similar information. *See* 5 C.F.R. § 293.311.

We agree with NNSA/SC that a substantial privacy interest exists in the identity of private contractor employees due to the great potential that a commercial entity could misappropriate a name for commercial purposes. The courts have also reached this conclusion. *See Sheet Metal Workers v. Dep't of Veterans Affairs*, 135 F.3d 891 (3d Cir. 1998) (the disclosure of names, social security numbers, or addresses of government contractor employees would constitute an unwarranted invasion of personal privacy); *Painting and Drywall Work Preservation Fund v. HUD*, 936 F.2d 1300 (D.C. Cir. 1991) (the release of contractor employees' names and addresses would constitute a substantial invasion of privacy). Therefore, we find that there is a substantial privacy interest in the identity of these contractor employees.

2. The Public Interest

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure of the information. The Supreme Court has held that there is a public interest in disclosure of information that “sheds light on an agency's performance of its statutory duties.” *Reporters Committee*, 489 U.S. at 773; *see Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (August 5, 1996) (Case No. VFA-0184). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Dep't of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). We find that there is no public interest in release of the withheld information. The Appellant has

¹ All OHA decisions issued after November 19, 1996 may be accessed at <http://www.oha.doe.gov/foia1.asp>.

not demonstrated how the disclosure of the names, titles or initials of non-federal employees will reveal anything of importance regarding the DOE nor how it would serve the public interest. Revealing the names of private citizens will not contribute significantly to the public's understanding of government activities. Accordingly, we agree with NNSA/SC, and find that there is no public interest in the disclosure of the names, titles, and initials withheld pursuant to Exemption 6.

3. The Balancing Test

In determining whether information may be withheld pursuant to Exemption 6, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762; *SafeCard Service v. SEC*, 426 F.2d 1197 (D.C. Cir. 1991). We have concluded that there is a substantial privacy interest at stake in this case. Moreover, we found that there is no public interest in the release of identifying information of private contractor employees. Therefore, we find that the public interest in disclosure of the information withheld pursuant to Exemption 6 is outweighed by the real and identifiable privacy interest of the individuals whose identities were protected.²

B. Adequacy of NNSA/SC's Search for Responsive Documents

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (August 22, 2002) (Case No. VFA-0760).

We contacted NNSA/SC for information regarding its search for responsive documents. We were informed that construction activities at the Mixed Waste Landfill are being performed by subcontractors of the prime DOE contractor Sandia Corporation. As a result, NNSA/SC referred the request to Sandia. The individual responsible for responding to FOIA requests at Sandia identified two organizations within the company where documents responsive to the request would most likely be found, Transportation and Environmental Safety, and Environmental Programs and Assurance. These two organizations conducted searches and located the documents that were released to the Appellant. Memorandum of telephone conversation between Shirley Peterson, NNSA/SC, and Steve Goering, Office of Hearings and Appeals (October 15, 2007) (conference call included official from Sandia) .

In its Appeal, CANM notes that an attachment to one of the documents provided in NNSA/SC's determination, the "MWL Cover Construction Quality Assurance Plan," contains blank Inspection Checklist and Construction Inspection forms and other documents. CANM asserts that the completed

² CANM claims in its Appeal that NNSA/SC inconsistently applied Exemption 6 to the documents in question, noting that one of the documents released revealed the author's name. However, the release of this name appears to have been inadvertent. Letter from Sandia attorney (September 17, 2007). Such an inadvertent release clearly does not provide a basis for the intentional release of further information subject to Exemption 6.

versions of these forms should have been provided in response to its request. After the filing of the present Appeal, Sandia informed us that certain of these documents were not available from the subcontractor at the time of CANM's request but are now available to Sandia. Letter from Sandia official to Andrea Leal, NNSA/SC (October 10, 2007). These documents, which include "Testing Inspection Forms, Construction Inspection Forms, Soil/Aggregate Forms, Field Density Forms & Lift Maps 1 through 12," have been provided to NNSA/SC, which will issue a new determination regarding their release. Electronic mail from Shirley Peterson, NNSA/SC, to Steve Goering, Office of Hearings and Appeals (October 15, 2007).

Based upon the information above, we find that NNSA/SC's search was reasonably calculated to locate the documents sought by CANM, in that it extended to the DOE prime contractor responsible for the MWL and in particular to those organizations within the contractor where documents responsive to the particular request at issue were most likely to be located.³ We therefore find NNSA/SC's search met the adequacy requirements of the FOIA.

Having found that NNSA/SC properly withheld identifying information regarding contractor employees from the documents it released to CANM, and that its search for documents responsive to CANM's request was adequate, we will deny the present Appeal.

Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Citizen Action New Mexico on September 11, 2007, OHA Case Number TFA-0224, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: October 19, 2007

³ Sandia stated in its response that it "cannot speak to or address any data that may have been collected by the DOE or the NMED during" the dates relevant to the request. Letter from Sandia official to Andrea Leal, NNSA/SC (October 10, 2007). However, the head of the Transportation and Environmental Safety organization at Sandia stated that he was not aware of the collection of data at the MWL by any DOE official. Memorandum of telephone conversation between Shirley Peterson, NNSA/SC, and Steve Goering, Office of Hearings and Appeals (October 15, 2007).